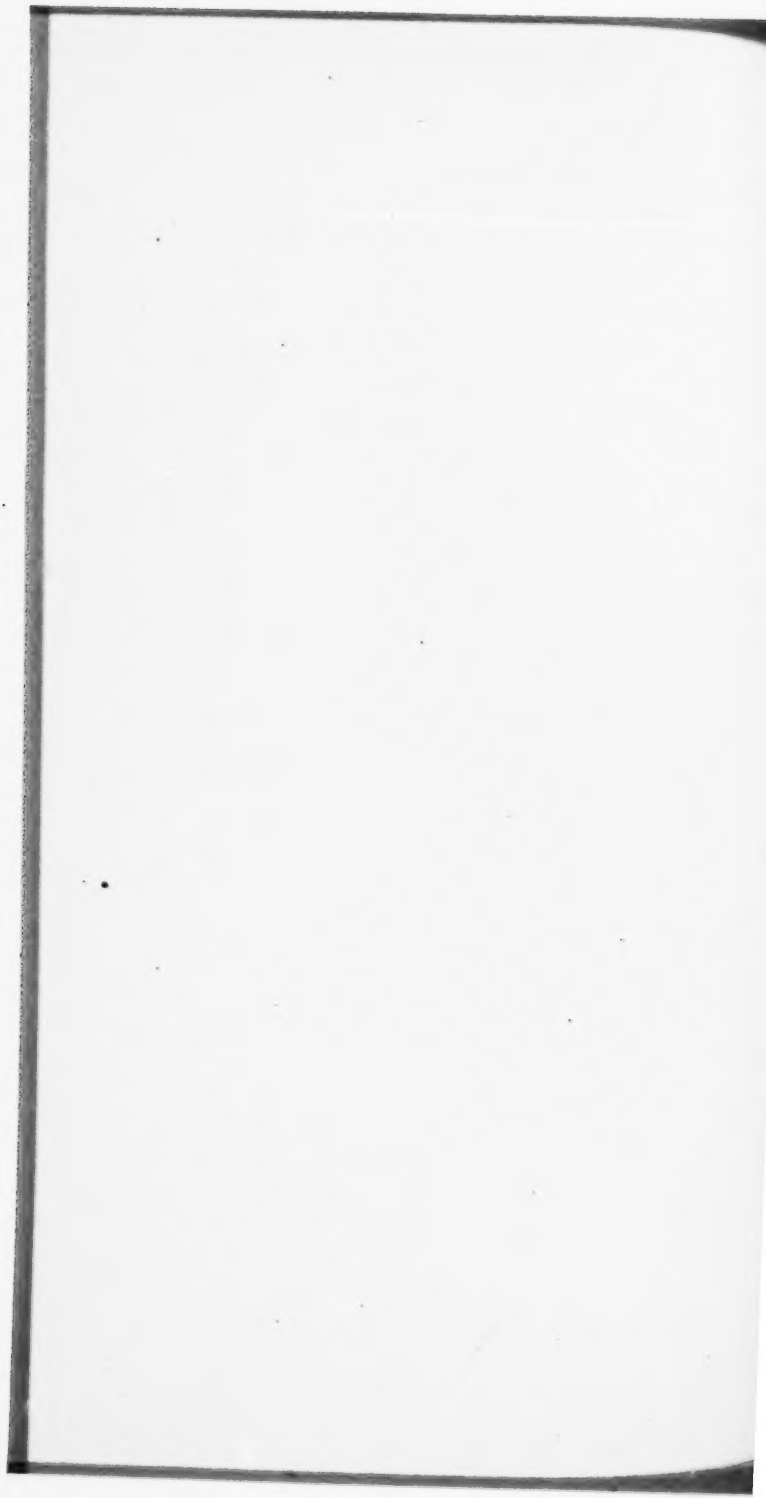


No. 241 34

Br. of Bunn & Kerr for D. & E.

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Supreme Court of the United States.

Filed April 16, 1900.

OCTOBER TERM, 1899.

NUMBER 241.

FRED HEWITT,
Plaintiff in Error,

v.

EMIL SCHULTZ and FRIEDERIKA SCHULTZ,

ARGUMENT FOR DEFENDANTS IN ERROR.

C. W. BUNN and
JAMES B. KERR,
Counsel for Defendants in Error.

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ARGUMENT FOR DEFENDANTS IN ERROR.

This case comes to this court upon a writ of error directed to the Supreme Court of North Dakota. The action is in the nature of ejectment to recover the possession of the Northeast quarter of Section 13, Township 132 North of Range 57, West, Sargent County, North Dakota. The land is situated within the first indemnity or forty and fifty mile limits of the grant to the Northern Pacific Railroad Company by act of Congress approved July 2, 1864 (13 Stat., 365).

The complaint is in the usual form and alleges title, right to possession, ouster by the defendants, and prays for a recovery of the possession of the premises (Transcript p. 3).

The answer contains first a general denial of all the allegations of the complaint, except the possession of the premises by the defendants which is admitted. The answer also contains an equitable defense and counterclaim, allowed under the practice in North Dakota, setting up a full equitable title in the defendants to the lands in controversy (Transcript pp. 4-24).

The answer alleges that through proceedings in the land department of the United States, taken under a mistake of law, a patent for the lands described was issued to the plaintiff, and concludes with a prayer that the defendants be decreed to be the equitable owners of the premises, and that the plaintiff be decreed to hold whatsoever title he has acquired by virtue of the patent in trust for the benefit of the defendants.

The equitable title of the defendants is denied in plaintiff's reply (Transcript pp. 24-28).

The case was tried before the court without a jury, upon an agreed statement of facts. (Transcript pp. 29-44). This statement was adopted by the court and incorporated in its findings (Transcript pp. 44-61).

The District Court of Sargent County, where the case was tried, rendered judgment for the plaintiff and this judgment was reversed by the Supreme Court of North Dakota and judgment there entered

dismissing the complaint. (Transcript, pp. 85-86).

PLAINTIFF'S TITLE.

The facts upon which plaintiff bases his title are as follows:

April 10, 1882, plaintiff was qualified to acquire lands under the pre-emption law of the United States, and on that date he settled upon and improved the premises in controversy with the intention of entering the same under the act of congress approved September 4, 1841, and on November 2, 1882, he presented to the United States land office at Fargo his declaratory statement for said tract, which was received and filed. (Finding X. Transcript p. 56).

Plaintiff resided upon and cultivated the land from April 10, 1882, to April 4, 1883, when he submitted final proof therefor and tendered the government price for the land. Plaintiff's final proof was rejected by the local officers, who assigned as a reason therefor that the land in question had been withdrawn from entry for the benefit of the Northern Pacific Railroad Company, as hereafter more fully stated. Plaintiff appealed from the decision of the local officers to the commissioner of the general land office who, on October 5, 1883, affirmed the decision of the local officers. Plaintiff had no notice of this last decision until about Aug-

ust 1, 1888, at which time he made application for a review thereof to the commissioner of the general land office, and that officer, on September 25, 1888, rendered a decision reversing his former ruling, and decided that plaintiff's final proof should be received. (Finding XI., Transcript p. 56).

The Northern Pacific Railroad Company appealed from the decision of the commissioner of the general land office to the secretary of the interior, and on August 11, 1894, the secretary of the interior affirmed the decision of the commissioner, and directed that plaintiff's final proof be received.

The decisions of the commissioner of the general land office and of the secretary of the interior appear at length in the record. (Finding XI., Transcript pp. 56-58).

In pursuance of these decisions, final proof having been made by the plaintiff, letters patent of the United States were issued on June 22, 1895, purporting to convey to the plaintiff the premises in controversy. (Finding XI., Transcript p. 58).

Plaintiff resided upon the land from April 10, 1882, to June 21, 1884 (Finding XI., Transcript p. 58).

DEFENDANT'S TITLE.

By act of congress approved July 2, 1864, lands were granted to the Northern Pacific Railroad Company to aid in the construction of a line of railroad from a point on Lake Superior westward to Puget Sound. Section 3 is as follows:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, * * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in th eoffice of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * * * * " **(Finding I,** Transcript p. 45).

On May 26, 1873, the railroad company filed in the office of the commissioner of the general land office a map of the definite location of that portion

of its road in Dakota Territory extending from the Red River of the North to the Missouri river. (Finding V, Transcript p. 48).

Upon the filing of the map of definite location the commissioner of the general land office marked and designated upon the maps and records of his office the limits of the lands granted by congress to said railroad company, namely; forty (40) and fifty (50) miles on each side of said line of definite location, and on June 11, 1873, the commissioner of the general land office, acting under the direction of the secretary of the interior, transmitted a diagram showing the situation of said lands with reference to the line of definite location, together with a letter of instructions, directing the local land officers to withdraw and withhold from sale or entry all the odd numbered sections, both surveyed or unsurveyed, falling within those limits, and this letter and diagram were duly received at the United States district land office at Pembina, D. T., (that being the district within which the lands in controversy were then situated), June 24, 1873. (Finding V., Transcript pp. 48-49).

The land in controversy was coterminous with this line of definite location and more than forty and less than fifty miles distant therefrom and within the indemnity limits, and was, at the date of the grant, at the date when said line was definitely fixed by filing the plat in the office of the commissioner of the general land office, and at the date of said order of withdrawal, and at the date of receipt of said order of withdrawal, and at all times

herein mentioned, except as hereinafter set out, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, and was and is non-mineral in character. (Finding V., Transcript p. 49).

This order of withdrawal remained in force until revoked by the secretary of the interior, August 15, 1887. (Finding V., Transcript p. 49).

The railroad company constructed the whole of its line from Lake Superior to Puget Sound, including the portion opposite the land here in controversy, in all respects as required by said act. (Finding VI., Transcript p. 50).

March 19, 1883, the Northern Pacific Railroad Company filed in the land office at Fargo, Dakota, a list of selections under its grant, embracing the land in controversy, and claiming said tract as indemnity under the act of July 2, 1864; and paid to the receiver of the land office the fees required by law.

Thereupon the local officers, after examining the list of the lands so selected, attached to the list a certificate (set out at length in the findings), whereby they certified that the filing of the list was allowed and approved, and that the whole of the lands sought to be selected were surveyed public lands of the United States; that no part thereof had been returned as mineral lands, and that there was no homestead, pre-emption, state or other valid claim to any portion of said lands on file or of record in their office. And they further certified to

the payment of the fees as required by law. (Finding VII., Transcript pp. 50-51).

The findings set out at length the instructions of the secretary of the interior under which this selection was made, and by the terms whereof it was directed that the Northern Pacific Railroad Company should not be required to file lists of losses with its selection lists, it being directed that the work of ascertaining the losses to be used as basis for the selections should be performed in the office of the commissioner of the general land office. (Finding VII., Transcript pp. 50-53).

A further statement of the steps taken by the railroad company for the purpose of complying with subsequent directions given by the secretary of the interior in the matter of specifying the loss as a basis for its selection of the land in question is given in a subsequent portion of this brief, under the discussion of the selection.

By a contract dated June 21, 1884, the railroad company agreed to sell, and the defendant, Emil Schultz, agreed to buy, in consideration of the payment of $1,200.00, the land in controversy, and on payment of the purchase price, on December 18, 1889, the railroad company conveyed to Schultz by warranty deed the land covered by his contract. (Finding XIII., Transcript p. 58).

Upon these facts the Supreme Court of North Dakota held that the land covered by the patent issued to Hewitt was withdrawn from entry when his claim was initiated by virtue of the order of withdrawal of June 11, 1873. The court held the

patent void and dismissed the action. The opinion is printed at pages 86-91 of the transcript and reported in 7 North Dakota, 601.

ARGUMENT.

If the lands were withdrawn when the plaintiff initiated his claim by filing his pre-emption declaratory statement, November 2, 1882, he acquired no rights and the land was subject to the selection of the railroad company on May 19, 1883. Sections 2257 and 2258 of the Revised Statutes of the United States provide what lands shall be subject to the right of pre-emption and what lands may not be acquired in this manner. Those sections are as follows:

Section 2257:—"All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption, under the conditions, restrictions, and stipulations provided by law."

Section 2258:—"The following classes of lands, unless otherwise especially provided for by law, shall not be subject to the rights of pre-emption, to-wit:

First—*Lands included in any reservation by any treaty, law, or proclamation of the president, for any purpose.*

Second—Lands included within the limits of any incorporated town, or selected as the site of a city or town.

Third—Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

Fourth—Lands on which are situated any known salines or mines."

Lands withdrawn from entry by order of the commissioner of the general land office are lands included in a reservation by proclamation of the president" and fall within the first exception to section 2258 supra. *Wolsey v. Chapman*, 101 U. S. 755, 769.

It is well settled that where the executive officers of the government attempt to dispose of lands under the pre-emption law which fall within these exceptions, they act beyond their jurisdiction and their acts are void, and a patent issued upon an entry of land not subject to the jurisdiction of the land department does not pass the legal title and such a patent may be challenged in an action at law. This was the conclusion reached in *Burfening vs. Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, 163 U. S. 321.

This was an action of ejectment brought to recover possession of certain islands in the Mississippi river and within the corporate limits of the city of Minneapolis. The plaintiff relied upon a patent of the United States, purporting to convey the land in question, based upon a soldier's additional homestead entry. The patent was dated June 13, 1884, and the plaintiff's right was initiated March 27, 1883, on which latter date he applied to enter the land in question. The land department allowed the entry and issued patent, and it was insisted at the trial, upon the part of the plaintiff, that the determination by the land department that the land in question was subject to entry at the date when the patentee's right was

initiated was conclusive. The court conceded that where the patentability of public lands depends upon questions of fact which are committed to the consideration and determination of the land department, such determination is final, as, for instance, the determination by the department that a certain tract is swamp land or saline land or mineral land. The court says, however:

"But it is also equally true that when, by act of congress, a tract of land has been reserved from homestead and pre-emption or dedicated to any special purpose,proceedings in the land department in defiance of such reservation or dedication, although culminating in patent, transfer no title and may be challenged in an action at law. In other words, the action of the land department cannot over-ride the expressed will of congress, or convey away public land in disregard or defiance thereof."

The court therefore held that the patent was void and the plaintiff could not recover.

It follows, therefore, in the case at bar that if the land in controversy was withdrawn from entry when the plaintiff tendered his pre-emption declaratory statement on November 2, 1882, the land officers were without jurisdiction to receive his application and no rights were acquired by the plaintiff which would defeat the selection of the railroad company made May 19, 1883.

THE WITHDRAWAL.

But it is contended by the plaintiff that the commissioner's order of withdrawal of June 11, 1873, was void and the land in question was open to preemption when plaintiff filed his application.

This was the view taken by the secretary of the interior in 1894. In this decision the secretary reversed the decision of the commissioner of the general land office rendered in 1883 when that officer had held that the withdrawal was valid and that the plaintiff acquired no rights.

Before considering the question of the authority of the commissioner of the general land office to order a withdrawal of indemnity lands for the benefit of the Northern Pacific Railroad Company, it will be proper to consider generally the authority of the land department over the public domain and the authority of its officers to withdraw from the operation of the general land laws of the United States lands otherwise open to acquisition under those laws.

The question was first squarely presented to this court in *Wolcott vs. Des Moines Co.*, 5 Wall. 687. In this case the following facts appeared:

By act of congress, August 8, 1846, there was granted to the then territory of Iowa:

"For the purpose of aiding said territory *to improve the navigation of the Des Moines river from its mouth to Raccoon Fork*, so called, in said territory, one equal moiety in alternate sections, of the public lands, in a strip five miles in width on each side of said river."

It appeared that the Des Moines river flows from the northern boundary of Iowa and empties into the Mississippi river at the southeast corner of the state, and receives the waters of the Raccoon Fork about the middle of the state.

The extent of the land grant under this act was the subject of continuous conflict of opinion. For a time it was held by the officers of the land department that the grant extended the full length of the Des Moines river in the territory, and then that it extended only to the mouth of the Raccoon Fork. The courts were also divided upon the question until the latter construction was finally placed upon the act by this court in *Railroad Company vs. Litchfield,* 23 Howard, 66.

By the terms of the grant, the lands inuring to the territory were to be selected subject to the approval of the secretary of the treasury and, under the construction of the act that the grant extended above the Raccoon Fork, thousands of acres so situated were patented under the grant and all of the odd numbered sections within five miles of the river above Raccoon Fork were withdrawn. Then came the decision by this court, holding that the grant did not extend above Raccoon Fork.

The validity of the executive order of withdrawal of the odd numbered sections above the Fork was presented in this wise: May 15, 1856, congress passed an act granting to the state of Iowa to aid in the construction of certain specified railroads, every alternate section (designated by odd num-

bers) for six sections in width on each side of said roads, with the following proviso:

"That any and all lands heretofore reserved to the United States by any act of congress, or *in any other manner by competent authority, for the purpose of aiding in any objects of internal improvement, or for any purpose whatsoever, be, and* the same is hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands. * * * * "

It was contended that this grant to the state for the benefit of the railroads passed title to the lands covered by the executive withdrawal above Raccoon Fork. It was admitted that these lands passed unless excluded by the proviso. The court sustained the validity of the withdrawal, and said:

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory; as we have seen they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the president and cabinet; beside, if this power was not competent, *which we think it was* ever since the establishment of the land department, and which has ben exercised down to the present time, the grant of the 8th of August, 1846, *carried along with it by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated.* Hence immediately upon a grant being made by congress for any of these public purposes to a

state, notice is given by the commissioner of the land office to the registers and receivers to stop all sales either public or by private entry. Such notice was given the same day the grant was made in 1856 for the benefit of these railroads. That there was a dispute existing as to the extent of the grant in 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

To the same effect is *Wolsey vs. Chapman*, 101 U. S., 755.

The precise question here presented of a patent issued upon an attempted pre-emption of land covered by an executive withdrawal was considered in *Riley vs. Welles*, 154 U. S., 578.

In that case the same withdrawal as that considered in the two cases last above cited was before the court and it appeared that the defendant had applied to enter the land in controversy under the pre-emption law and that a patent had issued to him. The court held the allowance of the entry and the issuance of the patent to be acts done in violation of law. See also *Wood vs. Beach*, 156 U. S., 359; *Spencer vs. McDougal*, 159 U. S., 62; *Musser-Sauntry, Etc., Co. vs. Northern Pacific Rd. Co.*, 168 U. S., 604.

In the case at bar the decisions of the commissioner of the general land office, and of the secretary of the interior, allowing plaintiff's entry and holding the withdrawal of the indemnity lands upon definite location to be void are based upon the previous decisions of the secretary in the cases

of *Northern Pacific Railroad Company vs. Guilford Miller*, 7 Land Decisions 100 and *Jennie L. Davis vs. Northern Pacific Railroad Company*, 19 Land Decisions 87.

In his decision in the Guilford Miller and Davis cases the secretary questions the general authority of the executive officers of the government to make orders of withdrawal, the decisions of this court on the subject being passed over without mention. This question, however, must be considered as settled.

The secretary finally concludes in these cases that the order withdrawing from the operation of the general land laws lands in the indemnity belt of the Northern Pacific grant was void and without effect to reserve these lands from pre-emption and bases his conclusions on two grounds:

First: That the legislative withdrawal under the provisions of section 6, the act of July 2, 1864, of lands within forty miles of the line of the road, upon filing of the map of general route, was intended by congress to be exclusive of any authority in the land department to withdraw lands in the indemnity belt after definite location.

Second: That section 6 contains in express terms a prohibition against the withdrawal of indemnity lands by executive authority.

IS THE LEGISLATIVE WITHDRAWAL EXCLUSIVE?

The language of the sixth section of the granting act, operating to effect a preliminary withdrawal of all odd numbered sections of land within forty miles of the line of general route, is passed on in *Buttz vs. Northern Pacific Railroad Company*, 119 U S. 55, as follows:

"The sixth section declares that after the general route shall be fixed, the president shall cause the land to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road and that the odd sections granted shall not be liable to sale, entry or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith and information thereof given in the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

And immediately following, in the same opinion, the court declares the purpose of this preliminary legislative withdrawal:

"The object of the law in this particular is plain, it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is by virtue of these provisions, so construed by this court, that the secretary of the interior concludes that it was the intention of congress that no withdrawal of indemnity lands should be made after the definite location of the road. He says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority and that its action on that behalf is intended to be exhaustive." (19 L. D. p. 89).

The secretary loses sight not only of the particular purposes for which this withdrawal on general route was provided, but of the intent of the whole act as apparent from its liberal terms and also a consideration of the circumstances under which the grant must be adjusted and which congress must have anticipated.

The preliminary withdrawal was for the purpose of securing the company between the time of filing its map of general route and its map of definite location. It was, of course, in contemplation that the general route of the road would be located within a comparatively short time after the passage of the granting act, but that it would require a much longer period to complete the explorations and accurate surveys necessary to a final definite location of the line. This in fact, turned out to be the case, for, although the maps of general route were filed in 1870, 1872 and 1873, the final maps of definite location were not filed until 1884. The preliminary withdrawal of forty miles on each side of the line of general route provided by congress to remain in force up to the time of definite location, was amply sufficient to substantially secure the rights of the company during that period. The line of the road being only approximately determined

by the map of general route, lands in the indemnity belt not then ascertained as such would have a speculative value, at the most, very remote, and the rush of settlers to appropriate these lands, induced by the prospect of a railroad and the consequent development of the country, could not have been looked for until the date of the definite location, when, for the first time, their proximity to the railroad would be assured.

It is submitted that this preliminary legislative withdrawal, instead of evidencing an intention on the part of congress that this exercise of the power of withdrawal should be exclusive, shows a disposition to protect the company in its full rights under the grant. As before stated, the withdrawal on general route was ample to protect the company up to the time of the definite location of its line, when its present grant of lands in place took effect and the limits of its indemnity belt became fixed. When this point was reached the function of the withdrawal on general route was fulfilled and at the same time by the terms of the grant, the right of selection of indemnity arose, the direction of which was expressly committed to the secretary of the interior. It is important to observe that without the withdrawal, the validity of which is here in issue, the right of selection would have been a barren right. By the act of June 2, 1862 (12 Stat. 413), the right of pre-emption was extended to all unsurveyed lands as well as surveyed lands, and, but for the executive withdrawal, the entire indemnity belt of the company's grant would have been

subject to appropriation for a long period of time during which the company could have made no selection. The right of selection by the terms of the act creating it, was limited to odd numbered sections and until the indemnity lands were surveyed, the odd numbered sections must remain unascertained.

It seems plain that no intention on the part of congress to curtail the powers of the executive in respect to this particular grant, exercised without question in a score of other cases, can be predicated on the provision of section six creating a legislative withdrawal from the location of the general route to the time of definite location. Substantial, and indeed conclusive, evidence of this view is found in the joint resolution of May 31, 1870 (10 Stat. 378), amendatory of and supplemental to the original granting act of July 2, 1864. By the joint resolution of 1870, the company was given the right in any state or territory to select odd numbered sections of land within ten miles beyond the limits prescribed in the act of 1864, in lieu of lands lost from the grant betwen the date of the act, July 2, 1864, and the date of definite location.

It is inconceivable that congress would create a right of selection by the act of 1864, which we have shown was a barren right, without the usual protection of an executive withdrawal, and six years later, by an act amendatory of the original granting act, give such plain evidence of its intention that the company should enjoy to the full extent

the benefits conferred and intend that its first provision for indemnity should be a nullity.

In construing this grant in *Northern Pacific R. R. Co. vs. St. Paul, Minneapolis & Manitoba R. R. Co.*, 26 Fed. 551-554, Mr. Justice Brewer, sitting at circuit, indicates the rule which must control its construction, that the conditions apparent to congress at the time of its passage must be kept in view. He says:

"While the grant is vast, the line to be constructed in order to earn it, is continental. The grant was made because congress believed the public good required the road, and, in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it is *fairer to presume that congress intended the freest bounty rather than to believe* that it burdened the grant with extra exceptions which when construction became feasible might largely deplete it of value."

Referring again to the case of *Wolcott vs. Des Moines River Co.*, 5 Wall. 687, it will be observed that the court says that the granting act there under consideration, "*carried along with it, by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated.*"

A careful examination of the act in question (August 8, 1846, 9 Stat. 77) discloses that the provision referred to by the court was the requirement that the lands granted should be selected by an agent of the territory, "subject to the approval of

the secretary of the treasury of the United States."

Place this provision side by side with the provision of section three of the Northern Pacific granting act, giving the right of indemnity, which is as follows: "Other lands shall be selected by said company in lieu thereof, *under the direction of the secretary of the interior,*" and the conclusion follows that the Northern Pacific grant carried with it not only the power but the duty to reserve the indemnity lands for the benefit of the company.

The proposition laid down by the secretary of the interior where he says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive," meets with a conclusive answer in the case of *Wood vs. Beach,* 156 U. S. 549.

In this case Wood attempted to acquire land as a homestead which was within the indemnity limits of the grant to the Leavenworth, Lawrence & Galveston Railway Company, and also within the like limits of the grant to the Missouri, Kansas & Texas Railway Company. The land had been withdrawn under both grants by departmental orders prior to the settlement of Wood. After citing, with approval, the Des Moines River case, the court say of the withdrawals for the benefit of the railroad companies:

"These withdrawals were not merely executive acts, but the latter one, at least, was in obedience to the direct command of congress. Section 4 of

the act granting lands to aid in the construction of what is now known as the Missouri, Kansas & Texas Railway (14 Stat. at Large, 290) is as follows:

"'Sec. 4. And be it further enacted, that as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of the said secretary to withdraw from the market the lands granted by this act in such manner, as may be best calculated to effect the purposes of this act and subserve the public interests'."

The grant for the benefit of the Missouri, Kansas & Texas road was a place grant of the odd numbered sections within ten miles on each side of the line of road with a right of indemnity selection within twenty miles. The withdrawal thus sustained by the supreme court was of indemnity lands.

Section 6 of the grant to the Northern Pacific Railroad Company provides that, after filing the map of general route, "the odd sections of land hereby granted shall not be liable to sale, entry or pre-emption." This is the congressional withdrawal which the secretary of the interior insists must be held to be exclusive of any withdrawal by a subordinate authority.

But in *Wood vs. Beach*, a direction to the secretary to withdraw from market "the lands granted by this act," was held not to exclude his authority to withdraw indemnity lands. If it be contended that indemnity lands are "lands granted," then the land in controversy in this case was withdrawn

by virtue of the provisions of section 6 above noted, but if indemnity lands are not "lands granted," then a statutory withdrawal of granted lands does not exclude the authority of the executive to withdraw indemnity lands.

DOES SECTION SIX PROHIBIT A WITHDRAWAL BY EXECUTIVE ORDER?

As before stated, the secretary places his decision, holding the withdrawal in question void, on two grounds. The first ground alleged has been discussed.

The second ground is that section six of the act of July 2, 1864, contains in express terms a prohibition against withdrawal of indemnity lands by the executive. The language construed to contain this prohibition is that which is printed in italics in the following quotation of section 6:

"Sec. 6. And be it further enacted, That the president of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, *and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road*

when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

It is declared by the secretary, that the provisions extending the pre-emption law and the homestead law to all other lands on the line of said road when surveyed, forbids the executive from withdrawing from the operation of the pre-emption and homestead laws any lands lying in the indemnity limits of the grant as determined by the map of definite location. An examination, however, of the pre-emption law as then in force, and a reading of this particular portion of the granting act in connection with that law, will show almost to a demonstration that the construction contended for is not only unreasonable but impossible. The pre-emption law of September 4, 1841 (5 Stat. 453), in section 10, after declaring the qualifications and conditions for acquiring public lands by pre-emption and extending the operation of the act to all *surveyed* lands, proceeds to define certain classes of land to which the pre-emption right shall not extend, including land reserved for the support of schools, lands included within the corporate limits of towns, lands on which are situated salines or mines, and further in terms as follows:

"No section of land reserved to the United States as alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement."

This exception of sections reserved to the United States alternate to others granted for the construction of canals, railroads or other public improvements, remained in force until March 3, 1853. At that time the following statute was enacted (10 Stat. 244):

"An act to extend pre-emption rights to certain lands therein mentioned.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,

"That the pre-emption laws of the United States as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same, in soldier's bounty land warrants estimated at a dollar and twenty-five cents per acre, or in gold and silver or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction: *Provided*, that no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve such lands prior to the final allotment of the alternate sections to such railroads by the general land office. *And provided further*, that the price to be paid shall in all cases be two dollars and fifty cents per acre or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres; *and provided further*, that any settler who has settled, or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the supreme court of the United States to be invalid, shall be entitled to all the rights of pre-

emption granted by this act and the act of fourth of September, eighteen hundred and forty-one, entitled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights, after the lands shall have been released from reservation in the same manner as if no reservation existed." Approved March 3, 1853.

The effect of this act was to modify materially the restrictive clause in the act of 1841 withholding from the operation of the pre-emption law sections reserved to the United States, alternate to others granted for the construction of railroads and other public improvements. The plain reading of the act of March 3rd, 1853, shows that its effect was to remove the restriction contained in the pre-emption law of 1841, as to sections alternate to railroad lands from the passage of the act up to the time of "final allotment of the alternate sections to such railroads by the general land office." The act was so construed by the rules of the general land office quoted below (1 Lester, p. 509):

"SYNOPSIS OF RULES ADOPTED BY THE GENERAL LAND OFFICE FOR THE RAILROAD DESK.

"First: By the act of 4th September, 1841 (No. 48). 'No sections of land reserved to the United States, alternate to other sections, granted to any of the states, for the construction of any canal, railroad, or other public improvement,' are subject to the operation of said act. But—

"Secondly: The act of 3rd March, 1853 (No. 222), and Act of 27th March, 1854 (No. 234), materially modify the restrictive or interdictive clause in the Act of 1841. The act of March 3d, 1853, steps in and partly takes off the inhibition contem-

plated in Act of 1841 by extending the pre-emption laws, at a price of $2.50 per acre, 'over the alternate reserved sections of public lands along the lines of the railroads of the United States,' *where the party had settled and improved the land 'prior* to the *final allotment* of the alternate sections to such railroads, by the General Land Office.'

"Pre-emptions under this Act of 1853, attach within the following periods, to the *United States reserved sections*: 1. Form the date of the 'definite location' of the road (viz., according to the Attorney General's opinion, February 16, 1857), *when the route is surveyed and staked off on the ground*, until the 'final allotment,' by the General Land Office, of the railroad sections, and that is the *date of official list* certifying the latter sections to the State.

"We take the 'definite location' of the route as the period when this Act of 1853, with its $2.50 price applies, for the reason, not only that such seems to be the current of official decisions, but because, up to such 'definite location' there really are no United States alternate sections so set apart, as would be notice, or grounds of inquiry to purchasers. 2. Pre-emption will not attach under this law to the *United States reserved sections*, after the date of 'final allotment,' to the day of offering at public sale, for the reason that the interdicting clause in the Act of 1841, *again applies* to the United States alternate reserved sections aforesaid, the Act of 1853 only taking it off up to the period of final allotment."

It will be observed further, that the act of March 3rd, 1853, although partially removing the restrictions as to alternate sections of railroad grants contained in the pre-emption law, increased the price per acre at which these lands might be acquired during the period contemplated by the act of 1853, to $2.50 per acre. The right of settlers

to acquire lands within the limits of railroad grants alternate to the lands granted for the benefit of railroad companies, was governed by these two acts at the time of the passage of the act of July 2, 1864. Prior to 1853, when the pre-emption law was extended, under the restriction noticed, to these alternate sections, all grants for the construction of railroads, canals and other public improvements, had been made, not to incorporated companies, but to states for the benefit of such companies as might thereafter be incorporated and should comply with the legislation of the respective states controlling the disposition of land granted to them.

Under the practice just indicated and in force in 1853, considerable time would necessarily elapse between the date of the grant to a particular state and the time when the company organized under the legislation of such state would earn the land and the state would become entitled to demand from the general land office that the land in question be certified to it. The grant of July 2, 1864, to the Northern Pacific Railroad Company, was one of the first instances of a departure from the former uniform practice of granting lands for railroads to states instead of directly to railroad companies. The grant to the Northern Pacific being in terms a present grant and its right to the lands enuring upon the definite location of its line, the period contemplated by the act of 1853 during which the restriction contained in the pre-emption law was removed could not arise. The act of 1853 extended the operation of the pre-emption law over

the alternate reserved sections up to the time when the granted lands should be finally allotted by the general land office. Under the provisions of the act of July 2, 1864, no period would arise during which the act of March 3rd, 1853, could operate. As indicated by the construction placed by the department on the act of 1853, the alternate reserved sections were open to pre-emption from the time of the definite location of a road to the time of final allotment, it being considered that no sections could be identified as "alternate reserved sections" until the definite location of the line. Under the act of 1864,the company took a present title without "final allotment" by the land office, to its granted sections immediately upon the filing of its map of definite location, and to continue and extend the spirit of the act of 1853, the particular language under consideration was inserted in the grant to the Northern Pacific Railroad Company. Without an extension in terms of the pre-emption and homestead laws to the reserved sections in the place limits of the company's grant, no rights to these lands could be acquired thereunder and, extending the policy which brought about the act of 1853 and which has been followed in every grant since the passage of the act of July 2, 1864, this language was inserted:

Grant to California and Oregon Railroad Company, act of July 25, 1866, section 2 (14 Stat. 239); grant to Atlantic and Pacific Railroad Company, act of July 27, 1866, section 6 (14 Stat. 292); grant to Stockton and Copperopolis Railroad Company,

act of March 2, 1867, section 5 (14 Stat. 548); grant to Oregon Central Railroad Company, act of May 14, 1870, section 2 (16 Stat. 94); grant to Texas and Pacific Railroad Company, act of March 3, 1871, section 12 (16 Stat. 573). In all of these grants by various provisions the pre-emption law was extended to the reserved alternate sections. That the effect of these provisions and of the language in section 6 of the Northern Pacific act was to carry out the spirit of the act of March 3, 1853, and not to forbid a withdrawal of indemnity lands is demonstrated by an examination of the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company (14 Stat. 94). Section 5 of this act is almost word for word the same as section 6 of the Northern Pacific act. But the Placerville and Sacramento grant *contains no indemnity provision* and the only possible purpose for inserting such language was in pursuance of the settled policy to cover the exception in the pre-emption law relating to the reserved sections. And this was the construction placed upon section 6 of the Northern Pacific act before this exception of the pre-emption law was repealed in 1874 by the adoption of the Revised Statutes, and when the executive officers of the government were familiar with the history of legislation. The first interpretation put upon this language is found in a letter of Secretary Usher to the commissioner of the general land office, dated March 9, 1865, transmitting the so-called "Perham Map." This

letter is quoted in the opinion in *Oregon & C. R. Co. v. U. S.* 77 Fed. Rep. 79; 48 U. S. App. 6, and is as follows:

"Department of Interior.

Washington, D. C., March 9th, 1865.

"Sir:—

"Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from market. In view of the provisions of the 3rd and 6th sections of the act of congress, approved July 2, 1864, (Pamphlet Laws, pages 368-369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. *The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of congress.*

"Very respectfully, your ob't. servant,

"J. P. USHER, Secretary.

"The Commissioner of the General Land Office."

The concluding sentence of this letter shows that in 1865 the provisions of section 6 were understood to refer to the even numbered reserved sections. Moreover, the conclusion of the secretary that section 6 in terms extends the homestead and pre-emption laws to lands in the indemnity limits and forbids their withdrawal is reached without a

consideration of the acts of 1841 and 1853 here discussed, and furthermore without giving effect to the words "when surveyed," which occur near the close of the section.

By the terms of the act the pre-emption and homestead laws are only extended to "all other lands on the line of said road" *when surveyed,* and this language must be read in connection with the first provision of the section, to-wit:

"The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road."

This restriction that the pre-emption and homestead laws should not extend to the alternate reserved sections until surveyed is in full accord with the policy of the act of 1853, for in 1853 unsurveyed lands were not subject to pre-emption.

Furthermore, it is important to observe that, by the passage of the act of June 2, 1862 (12 Stat. 413), two years before the passage of the Northern Pacific granting act, the right of pre-emption was extended to all lands belonging to the United States to which the Indian title had been or should be extinguished "under the conditions, restrictions and stipulations" contained in the pre-emption law of 1841. By this it will be seen that under the construction of section 6, act of July 2, 1864, contended for by the secretary of the interior, congress must be held to have enacted that the pre-emption and homestead laws should be extended to the unsurveyed lands situated in the indemnity belt of the grant to the company *when surveyed,* although

two years earlier the same laws had been extended to these same lands.

THE DECISION OF THE SECRETARY IS CONTRARY TO THE SETTLED CONSTRUCTION OF THE ACT.

For nearly twenty years, the construction placed by the Interior Department upon the Northern Pacific grant was uniform and sustained the power of withdrawal of indemnity lands. Between 1871 and 1887 more than forty withdrawals of indemnity lands were made and the authority to make such withdrawals remained unquestioned until the decision by the secretary in the Guilford Miller case in 1888. The reports of land decisions by the secretary previous to 1888 are filled with cases in which the validity of these withdrawals was sustained. In the case of Prest vs. Northern Pacific Railroad Company 2 Land Decisions, 506 and in the letter of instructions of Secretary Teller, dated May 17, 1883, 2 Land Decisions 511, the question is considered at length and the power of withdrawal sustained. This construction prevailed during the terms of Secretaries Usher, Browne, Cox, Delano, Kirkwood and Teller.

In *United States vs. Pugh* 99 U. S. 269, this court said: "It is a familiar principle of interpretation that in a case of doubtful and ambiguous law, the contemporaneous construction of those who have

been called upon to carry it with effect is entitled to great respect."

In *United States vs. Moore,* 95 U. S. 763, this court gave one of the reasons for this rule: "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

The construction of the executive officers, to which the courts give weight, is the *contemporaneous* and continued construction. Every intendment is in favor of the correctness of the practical construction with which Secretary Vilas was confronted when he announced the doctrine of the Guilford Miller case, but his own decision in that case over-ruling the long settled construction must rest solely upon his argument which we have undertaken to show ignores important and indeed controlling considerations and leads to a conclusion which is incorrect. The conclusion of the supreme court of North Dakota sustaining the power of withdrawal is supported by *Thompson vs. St. P. & M. Ry. Co.,* 83 Fed. Rep. 546, and *Southern Pacific Railroad Co. vs. Groeck,* 87 Fed. Rep. 970. In the latter case, decided by the circuit court of appeals for the Ninth circuit, the court construed section 6 of the grant by act of congress of July 27, 1866 (14 Stat. 292). Section 6 of this act is identical with section 6 of the Northern Pacific act. The court held not only that section 6 did

not forbid a withdrawal of indemnity lands, but constituted a statutory withdrawal after definite location.

THE SELECTION WAS PRIOR TO ANY RIGHTS ACQUIRED BY THE PLAINTIFF.

If it be held that the legal title to the land in controversy passed by the patent for the reason that the withdrawal was revoked when the patent issued, although in force when the plaintiff filed his declaratory statement, nevertheless the patentee must be held trustee of the legal title for the benefit of the defendant. The principle is well established that where, through an erroneous construction of the law, the land department awards to one the patent for land to which another has initiated a prior right, the courts will correct the error and hold the patentee trustee for him who has the better right. *St. Paul, etc., R .R. Co. vs. Winona and St. Peter R. R. Co.*, 112 U. S. 720-723; *St. Paul & Pacific R. R. Co. vs. Northern Pacific R. R. Co.*, 139 U. S. 1; *Ard vs. Brandon*, 156 U. S. 537; *Johnson vs. Towsley*, 13 Wall. 72; *Shepley vs. Cowan*, 91 U. S. 330; *Moore vs. Robbins*, 96 U. S. 530.

The land in question being reserved by executive order during the whole period of plaintiff's occupation, and at the date of his application to enter the land, the railroad company was prior in time with its selection of March 19, 1883.

It appears by the findings (Finding VII., Transcript p. 50), that on March 19, 1883, the North-

ern Pacific Railroad Company filed in the United States district land office at Fargo, Dakota, a list of selections under its grant, embracing the tract in question, and paid to the receiver of said office the fees required by law; that the tract was within this land district and within the indemnity limits of the grant and that at the date of said selection the tract was public land of the United States and free from pre-emption and other claims or rights except such claim as plaintiff herein may have had; that the register and receiver of said land district accepted and filed the list and attached thereto a certificate reciting the facts just stated, but making no exception of plaintiff's claim (Finding VII., Transcript p. 50).

It further appears that on May 28, 1883, the secretary of the interior issued the following instructions, to-wit: (Finding VII., Transcript p. 51):

"The Commissioner of the General Land Office,

Sir: It is my desire to open for settlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Company not actually required to supply the land lost in place within the granted limits.

The grant should be adjusted at the earliest possible time, that the orders of withdrawal may be vacated without unreasonable delay, as indicated in my letter of the 17th instant.

The unparalleled demand for lands for actual settlement by great numbers of persons, not only from foreign countries, but from the older states, seeking homes under the settlement laws along the line and within the vicinity of the Northern Pacific grant requires for the best interests of the country, and for all parties concerned, that the with-

drawals should not be maintained any longer than is actually necessary for the adjustment of the guaranteed rights of the company.

In order to facilitate the work of making selections, I think you should instruct the local officers that, when clear lists of selections, free from conflict or other objection, are filed with the district officers and approved by them, said selections should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of the lands lost in place to your office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore.

I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

Very Respectfully,
H. M. TELLER,
Secretary."

It appears that on August 4, 1885, the commissioner of the general land office issued the following instructions which were approved by the secretary of the interior, to-wit: (Finding VII., Transcript p. 52):

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions and will not place the selections upon record until directed so to do.

"Where indemnity selections have heretofore been made without specifications of loss, you will

require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed. The selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner. Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant, unappropriated land within proper sections and limits nearest the granted sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

"Approved: L. Q. C. Lamar,
Secretary."

It further appears that on October 12, 1887, the Northern Pacific Railroad Company filed in the United States district land office at Fargo a list designating an amount of lands equal to those so selected as aforesaid in the list of March 19, 1883, claimed to have been lost, and excepted from the grant, and which were within the place limits of the grant as defined on definite location, and that these lands were designated as a basis for said selections (Finding VII, Transcript, p. 52).

It further appears that on February 23, 1892, the railroad company filed a re-arranged list describing the lands selected on March 19, 1883, and set opposite each description of land so selected a tract of equal area lost from the place limits of its grant. The particular loss specified as a basis for the selection of the land in controversy was a tract granted to the state of Wisconsin to aid in the con-

struction of certain railroads by act of congress of June 3, 1856 (Findings VII, Transcript, p. 52). The tract so specified as a basis for the selection was situated east of Superior City and on November 15, 1895, the secretary of the interior held that the Northern Pacific act did not grant lands east of Superior City. The secretary, however, directed, in view of the previous uniform construction that the grant extended to Ashland, Wisconsin, that sixty days be allowed the company within which to substitute new losses in place of those situated between Superior and Asland (Finding IX, Transcript, p. 54).

The railroad company complied with this order and specified as a basis for the selection of the land in controversy another tract lost from the place limits by reason of being contained in the Crow Indian Reservation in Montana, but at the same time filed a statement that this substitution was made solely for the purpose of complying with the instructions of the secretary, saving and reserving all rights previously acquired (Finding IX, Transcript, p. 54).

It is submitted that this selection, made in strictest conformity to the requirements of the secretary of the interior, gave the railroad company a paramount right to the land. It was first in time, and therefore first in right. The company selected the land before the plaintiff acquired any right whatsoever, for the land was reserved when he applied to enter, and after the selection, made in accordance with the instructions of the secretary, no ad-

verse claim could attach. *Rudolph Nemitz,* 7. L. D. 80;*S. P. R. R. Co. v. Meyer,* 9 L. D. 250; *N. P. R. R. Co. v. Halvorsen,* 10 L. D. 15; *Lane v. S. P. R. R. Co.,* 10 L. D. 454; *Flippen v. S. P. R. R. Co.,* 14 L. D. 418.

That the selection was made in accordance with the directions of the secretary of the interior is clear.

The order of Secretary Teller, of May 28, 1883, dispensed with the assignment of losses in the selection lists by the company, and imposed the burden of assignng such losses upon the general land office.

It appears by the findings, as above stated, that the company filed in the proper land office its selection list embracing the tract in question, claimed under its grant, and paid to the receiver the fees required by law; that such list was examined and compared by the register and receiver, and the filing of it allowed and approved, and they certified that it was filed by the duly authorized agent of the company. Further than the order of Secretary Teller, of May 28, 1883, the instructions in the interior department at the time, governing the filing of selection lists, were as follows:

"Third—The state, through its grantee, or the grantee, as the case may be, is required to file with the register and receiver of the proper land office, descriptive lists of the tracts of land claimed as inuring under the grant within the sections of * * * miles each along the line of route on both sides thereof, to be dated and verified by the signature of the selecting agent."

Copp's (Western) Land Owner, vol. 1, p. 70.

These instructions and the order of Secretary Teller comprised all the directions of the secretary of the interior, under which the list of 1883 was filed and this selection was therefore in accordance with the words of the act of July 2, 1864, giving the right of indemnity selection. The court will take judicial notice of the rules and regulations of the Interior department. Wade on Notice, 2nd Ed. 729.

It is true that the selection list of 1883 was filed a short time before the promulgation of the order of Secretary Teller, of May 28.

The secretary of the interior in passing upon another tract involved in this identical list, filed at the Fargo land office, March 19, 1883, held that where no adverse claim intervened between the date of the selection and the promulgation of the order, the selection came within the provisions of the order. This ruling was made in the case of *Sawyer v. Northern Pacific R. R. Co.*, 12 L. D. 450, where the secretary said:

"This selection was made a short time previous to the order of Secretary Teller, allowing selection to be made without specification of loss. No adverse claim intervening between the date of the selection and the promulgation of the secretary, the selection came within the provisions of the order."

The circular of 1885 required that before further indemnity selections should be allowed, the company should specify losses for which prior selections had been made. Complying with this requirement the company filed a list of lost lands equal in area to those selected in 1883. There was

no requirement that the losses be matched or mated, tract for tract, with the selected lands. This was a strict compliance with the circular of 1885, as construed by the secretary of the interior.

In the case of *Sawyer v. N. P. R. R. Co., supra,* the secretary considers this identical list of losses in bulk filed in the Fargo land office, October 12, 1887, and decides that the filing of this list constituted a compliance with the order of August 4, 1885.

There was no specific requirement that losses be arranged tract for tract with lands selected until 1893. In *St. P. M. & M. Ry. Co. v. Lambeck,* 22 L. D. 204, the secretary says:

"Prior to the decision in the case of *La Bar v. N. P. R. R. Co., supra,* (Oct. 14, 1893,) there was no specific requirement that the lost lands should be arranged tract for tract with the selected lands."

Anticipating this requirement, however, the company rearranged its list of losses in bulk, set opposite to the land in controversy a tract of equal area, situated in Wisconsin, and excepted by disposition prior to definite location, and filed this rearranged list February 23, 1892. Under the construction of the grant then in force, this loss was a valid basis.

When, however, in 1895, the secretary held that the grant to the company did not extent east of Superior City, instructions were issued allowing sixty days for the filing of new bases for selections, for which Wisconsin losses had been specified and the loss filed by the company within the time prescribed is conceded to be a valid loss.

No doubt can exist as to the authority of the secretary to allow such substitution. In the absence of an *intervening* right, the question of the basis for an indemnity selection is solely a matter between the United States and the railroad company. The company is required by its grant to select "under the directions of the secretary of the interior," and as indicated by the statement of the secretary in his order allowing the substitution, these Wisconsin losses were specified as required, because nearest to the lands selected, the indemnity in Minnesota being insufficient to satisfy the losses in that state.

The secretary has affirmed the position taken by him in allowing this substitution in two cases lately decided. *Gamble v. N. P. R. R. Co.*, 23 L. D. 351; *Brown v. N. P. R. R. Co.*, 24 L. D. 370.

It is important to observe that but one selection of the tract in controversy was made and that in 1883, all subsequent lists filed being for the purpose of complying with later instructions of the secretary. *O'Brien v. N. P. R. R. Co.*, 22 L. D. 135.

The attention of the court is requested particularly to the fact that no objection was ever raised to the selection either as to form or substance. The ground upon which it was cancelled, and the only ground, was that plaintiff was prior in time, and we have endeavored to show that in this the department was in error.

In any event it is submitted that the land in controversy was appropriated to the railroad com-

pany without selection for the reason that it appears that the commissioner of the general land office has determined that the total area of lands in the indemnity limits are insufficient to satisfy the losses from the place limits (Finding VIII, Transcript, p. 53). The rule is declared by this court in *St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co.*, 139 U. S. 1-19, that under such circumstances the indemnity lands are appropriated without selection.

It is submitted that the judgment of the Supreme Court of North Dakota should be affirmed.

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